

What is the nature and extent of claimant's disability to her upper extremities? Claimant argues that the Award should be based on the opinion of board certified orthopedic surgeon C. Reiff Brown, M.D., that claimant suffered an 18 percent impairment to her left upper extremity and a 19 percent impairment to her right upper

extremity. Respondent argues that the opinion of board certified orthopedic surgeon John P. Estivo, D.O., that claimant suffered no permanent disability to her shoulders from these accidents, is the most credible, as Dr. Estivo was claimant's treating physician.

FINDINGS OF FACT

Claimant has been employed by respondent since 2001, working in repetitive duty jobs. By 2005, claimant was experiencing pain in her left shoulder. Gradually, the pain also spread to her right shoulder. Claimant came under the care of J. Mark Melhorn, M.D., on June 5, 2006, through January 25, 2007. Dr. Melhorn excised a cyst from claimant's left wrist and provided conservative treatment, including physical therapy and anti-inflammatory medication. Claimant was diagnosed with probable carpal tunnel syndrome and tendinitis of the shoulders. However, a nerve conduction test on June 27, 2006, was essentially normal. Dr. Melhorn also diagnosed de Quervain's tendinitis in claimant's left wrist and thumb.

Claimant later came under the care of Dr. Estivo, beginning on May 16, 2007. Dr. Estivo recommended MRI studies of both shoulders and NCT/EMG tests on both upper extremities. Claimant was then diagnosed with bilateral wrist flexor tendinitis and bilateral rotator cuff tendinitis. An injection into the subacromial space of the left shoulder was recommended and performed. Claimant was referred for additional physical therapy and restricted from repetitive use of her hands and restricted from over shoulder work. The NCT/EMG tests indicated very mild left carpal tunnel syndrome, but as it was not symptomatic, no treatment was recommended. An injection into the right shoulder was also recommended and performed. The injections into the shoulders appeared to be working, as by August 9, 2007, claimant's shoulder rotator cuff tendinitis was resolving bilaterally. Dr. Estivo also noted that the bilateral wrist flexor tendinitis was also resolving. Dr. Estivo returned claimant to work without restrictions and with no permanent impairment.

By January 9, 2008, claimant had returned to Dr. Estivo with a return of her wrist and shoulder symptoms. Claimant was again diagnosed with tendinitis in her wrists and shoulders. She was placed on a 20-pound maximum limit with no repetitive use of her arms and no over shoulder work. Claimant was given exercises to perform at home. On January 23, 2008, claimant returned to Dr. Estivo with the same complaints in her wrists and shoulders. Dr. Estivo again diagnosed claimant with bilateral tendinitis in her wrists and shoulders. At this time, he had no additional treatment recommendations. Claimant was given home exercises and told to take over-the-counter anti-inflammatory medication. Dr. Estivo determined that, as claimant had not lost any range of motion in her shoulders or wrists, she had no impairment, according to the fourth edition of the *AMA Guides*.¹

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was referred by her attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., for an examination on March 10, 2008. Dr. Brown diagnosed claimant with mild bilateral rotator cuff tendinitis and mild carpal tunnel syndrome bilaterally. He rated claimant with a 4 percent impairment of the right upper extremity for shoulder range of motion limitations, 3 percent impairment of the left upper extremity for range of motion limitations, 6 percent impairment to each upper extremity for bilateral shoulder crepitus and 10 percent impairment to each upper extremity for carpal tunnel syndrome, all of which combine for a 19 percent permanent partial impairment of the right upper extremity and an 18 percent permanent partial impairment of the left upper extremity. Dr. Brown acknowledged that both nerve conduction tests on claimant's right upper extremity were normal, and the first test on claimant's left upper extremity was normal, with the second being only borderline to mild for carpal tunnel syndrome.

Due to the differing opinions of the health care providers, the ALJ referred claimant to pain management specialist George G. Fluter, M.D., for an independent medical evaluation (IME) on July 1, 2008. Bilateral MRI scans of claimant's shoulders displayed minimal tendonopathy and no suggestions of rotator cuff tearing. Nerve conduction studies of the right upper extremity were normal, with mild abnormalities in the left upper extremity. On examination, no impingement was found in either shoulder, Tinel's sign was absent at both wrists and elbows, and the Finkelstein's test was negative bilaterally. Claimant was tender to palpation bilaterally in the subacromial area, and on the left side in the bicipital tendon area and acromioclavicular joint. Claimant was rated at 1 percent impairment to the right wrist for range of motion deficits and zero percent impairment to the left wrist. Claimant's shoulders were rated at 6 percent impairment to the right shoulder and 4 percent impairment to the left shoulder for range of motion deficits. Claimant had no impairment for right side carpal tunnel syndrome and a 5 percent impairment to the left wrist for normal to mild carpal tunnel syndrome. Using the combined ratings chart, claimant had a 7 percent permanent partial impairment to the right upper extremity and a 9 percent permanent partial impairment to the left upper extremity. No treatment recommendations were provided by Dr. Fluter.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

² K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁴

Here, the compensability of claimant's injuries is not in dispute. The dispute centers around the permanent impairment suffered as the result of these injuries. Dr. Estivo, one of the treating physicians, found claimant to have suffered no permanent impairment, even though claimant continued to experience symptoms at the time of her last examination. Dr. Brown found claimant to have crepitus in her shoulders, a finding made by neither Dr. Estivo nor by Dr. Flutter, and Dr. Brown diagnosed bilateral carpal tunnel syndrome, even though the EMG studies on the right upper extremity were normal both times. The decision by the ALJ to refer claimant for an IME is understandable in this situation. The ALJ found the decision by Dr. Flutter, as an independent examiner, to be the most credible and adopted same for the purposes of this award. The Board agrees with that analysis and affirms the award as written.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated February 27, 2009, should be, and is hereby, affirmed.

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 44-510e(a).

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge